Part 201 Liability/Compliance Workgroup Meeting No. 3 – Summary

November 29, 2006, 9:30 AM–12:30 p.m.
Public Sector Consultants
Lansing, Michigan

Workgroup Attendees
James Clift, Michigan Environmental Council
Steve Cunningham, RRD-Cadillac District Office
Charlie Denton, Varnum & Riddering
Mark D. Jacobs, Dykema Gossett
Doug McDowell, McDowell & Associates
Pat McKay, RRD-Compliance and Enforcement Section
Rick Plewa, Comerica Bank
Mary Jane Rhoades, Rhoades McKee
Jeanne Schlaufman, RRD-Southeast Michigan District Office
Alan Wasserman, Williams Acosta, PLLC

Observers
Rhonda Klann, RRD
Gary Kohlhepp, DEQ-Water Bureau
Bob Wagner, RRD
Ken Vermuelen, Warner, Norcross & Judd LLP
James Lancaster, Miller Canfield
Cortney Goldberg, Bodman LLP
Rebecca Yedlin, SEMCOG
Andrew Hogarth, RRD

Staff
Mark Coscarelli, Public Sector Consultants
Shivaugn Rayl, Public Sector Consultants

AGENDA

I. Welcome and Introductions

Mark Coscarelli welcomed workgroup participants. Personal introductions followed.

II. Review of November 1 Meeting Summary

The November 1 draft meeting summary was reviewed. The workgroup accepted the document with no proposed changes.

III. Discussion of Non-Liable Owner/Operator Provisions

A workgroup member provided a summary of a document previously transmitted that sought to outline general areas of agreement by workgroup members that pertains to new, non-liable owner/operators. It was emphasized that, if a shift occurs away from BEAs to strengthening due care provisions that include liability protection, caution must be given not to impose or recommend a strict liability standard for due care violations. A strict liability standard for violations would be viewed as a significant impediment to new transactions. The workgroup achieved consensus that the document accurately reflects the discussion to date.

Discussion

Due Care Plan

Discussion continued related to due care obligations. If the workgroup recommends using due care for the basis for liability protection, the question was asked 'what happens when there is a failure to carry out due care duties?' Responses suggested that due care is prospective and that reporting requirements may be a necessary part of a new liability protection scheme. There was general agreement that a failure of due care responsibilities would result in stipulated penalties, not revocation of the liability protection. The statute could be amended to provide for greater administrative remedies.

A suggestion was made that due care be monitored by annual certification. If certification is not completed each year, again there would be stipulated penalties. Those that need to be re-certified could be reminded with a post card each year. A comment was made that *certification* should be achievable by recognizing that the due care plan is adequate, in compliance, and representative of changing conditions.

A question was asked about DEQ's role in reviewing due care plans if these plans become the vehicle for liability protection. A suggestion was made that the plans become more prescriptive with built in performance-based standards, which could help alleviate exhaustive site characterization. Concern was expressed that sufficient site characterization data may not be available to assess due care plans. An alternative concern was expressed that, at the same time, due care should not be envisioned nor designed as a full remedial investigation. Additional comments suggested that due care should focus on pathway elimination with specified performance measures. It was said that this approach is memorializing the state–of–the–art best practice already occurring in the field.

Up-front approval of a due care plan creates a data need. To address a concern that DEQ data requests often have no endpoint, workgroup members suggested that there be three categories of response to a due care plan submission: approval, conditional approval, and denial. "Conditional" approval would be subject to ongoing review and could have fines attached if conditions are not met going forward.

It was suggested that, upon notice to the DEQ, approved plans should be transferable to new owners/operators under certain conditions, and that the threshold is based upon a change in use, not simply a change of ownership.

Due care plans should focus on methods to achieve specific goals and eliminate exposure pathways. It would become the responsibility of the DEQ to determine the goals (a pathway checklist is being developed by the complexity workgroup). It would become the responsibility of the applicant to ensure all relevant goals and pathways are addressed, and to choose the desired method by which to achieve the goals.

Improving Enforcement

The workgroup has identified two potential recommendations that are expected to help DEQ enhance compliance with Part 201: 1) definition of a *bona fide prospective purchaser*, and 2) expanded information request rights.

Under CERCLA, a bona fide prospective purchaser is one that did not have any relationship with the former, liable owner of a contaminated site. Defining *bona fide prospective purchaser* under Part 201 and requiring that a new owner/operator be in accord with the definition to benefit from liability protection could reduce the number of corporate machinations designed to elude strict liability. Under the current regime, the DEQ expends intensive resources to address and ferret out these corporate 'shell games.'

Secondly, the workgroup suggested a revised provision in Section 17 of Part 201 that allows the MDEQ and the Michigan Attorney General better access to corporate documents when a transfer of contaminated property appears to be an attempt to undermine liability. These transfers are legal under corporate laws of Michigan, but thwart the intent of the liability exemption for new, innocent owner/operators. Requiring more complete corporate document disclosure would allow the DEQ to be more efficient scrutinizing liable parties.

Transition from BEA to Due Care for Liability Relief

Those innocent owner/operators under the current BEA program that were exempt from liability would retain that exemption. After a grace period (e.g. 1 year), these owner/operators would be required to show that due care provisions are being met, or be subject to fines. Covenants on existing sites with transferability agreements would supersede new due care requirements.

Statute of Limitations

The workgroup agreed that the statute of limitations language under Part 201 is extremely difficult to interpret and can lead to undesired outcomes, and identified a need for revised language in the statute. This includes the private rights of contribution for cost recovery. A subcommittee was formed to draft new language for the workgroup's consideration. The subcommittee will report at the next meeting and the workgroup will discuss the draft language and attempt to reach consensus.

Subdivision and Condominium Laws

Overlap and coordination between Part 201 and the subdivision and condominium laws in Michigan create additional challenges. For example, it was explained that under mixed-use developments, it would be possible that a residential condominium owner would be required to maintain a due care plan for the entire development, which might include a gas station or dry cleaner. This stems from the definitions of ownership that apply in condominium law: ownership of a unit includes an undivided common interest in the common property. A subcommittee was formed to address these inherent conflicts between these laws and draft language for Part 201 that would clarify expectations and responsibilities of condominium owners. The goal is to insulate the individual residential owners except to the extent that they are liable to their condo association. A concern is that these provisions do not create a chilling effect on the mixed-use development trend. The subcommittee will report at the next meeting and the workgroup will discuss the draft language and attempt to reach consensus on any proposed changes.

Administrative Penalties

DEQ identified a need to induce compliance without resorting to litigation, which is expensive and time consuming. Administrative penalties or fines were suggested as a way to address this problem. The workgroup recognized that administrative penalties were difficult to collect because the penalized entity would challenge the levy. However, it was suggested that the penalties would be more of a threat to the regulated community than exists under the current Part 201 regime.

IV. Public Comment

Ken Vermeulen of Warner, Norcross, & Judd LLP offered comments related to the BEA and due care process and suggested that the current program is not broken to the extent that compliance could be enhanced through traditional and existing enforcement tools. Mr. Vermeulen indicated that the DEQ is simply not enforcing due care provisions currently. In subsequent comments, Mr. Vermeulen indicated that Michigan needs to keep its eye on the ball and that Michigan must remain attractive to business investment, where the current regime succeeds (e.g., brownfield redevelopment).

V. Next Meeting

The next meeting was set for Wednesday, December 13, 2006 from 9:30 am to 12:30 pm at the office of Public Sector Consultants.

The meeting adjourned at 12:30.

Non-Liable New Owners & Operators – Some Thoughts on the Process for Obtaining Release of Liability for Existing Contamination

1. **One of the key legislative intents of the Part 201 Amendments of 1995 was to create a mechanism whereby a new owner (with no responsibility for causing the existing contamination) could purchase a contaminated property and achieve a "release from liability" for the "legacy" contamination at the site.**

    - There is broad agreement (and perhaps consensus) that this should not change in any fundamental way, although there is a convergence of opinion that the "presumption" burden may need to be adjusted somewhat for sites with similar patterns of hazardous substance use across different owners.

2. **The "liability relief" mechanism written into Part 201 in 1995 enabled the new owner to buy his/her way out of the "strict" liability scheme by performing an adequate BEA and disclosing the BEA to the MDEQ and to subsequent transferees. A benefit was conferred on the new owner in exchange for a benefit received by the state (i.e., identification of "facilities" and some amount of site characterization data with which to reduce uncertainty).**

    - There is broad agreement (and perhaps consensus) that a mechanism to achieve liability relief should be retained -- albeit in a modified form.

    - There appears to be broad agreement that the emphasis of the mechanism (or process) for obtaining relief from strict liability should be some form of pre-acquisition site assessment that is comprised of an AAI-compliant Phase I ESA plus a Phase II investigation designed to gather sufficient relevant data to identify potential "unacceptable exposures" and to prepare an appropriate Due Care Plan to prevent those exposures.

    - There is consensus that this pre-acquisition site assessment should continue to be disclosed to MDEQ and to subsequent transferees as a condition of obtaining liability relief. (The data obtained during this assessment may also serve as the basis for establishing Due Care obligations or other requirements to be included in a license or permit issued to the new, non-liable facility owner.)

    - There appears to be general agreement that the Phase II component of this pre-acquisition site assessment will be inherently site-specific and driven by relevant exposure pathways, but that it should not amount to a full Remedial Investigation of the type that a liable party would be required to perform prior to a cleanup.

    - There is general agreement that MDEQ will need to establish new technical standards for the pre-acquisition site assessment which will replace the current BEA process (with its often unworkable focus on creating a basis for distinguishing past and future releases).

3. **The Legislature understood back in 1995 that many purchasers of contaminated properties (and their lenders!) would want assurance that they had met the requirements for buying their way out of the strict liability scheme. Many of these purchasers, the Legislature also knew, would want assurance that they had adequately defined their Section 7a obligations and had prepared an appropriate Due Care Plan to manage the risks of unacceptable exposure to residual contamination. Hence, provision was made in the statute for a process through which new owners could petition the MDEQ for a review of their BEA and Section 7a Compliance Analysis/Due Care Plan and request a determination of adequacy.**

    - ❖ The future role of the MDEQ in this process requires further discussion among work group members. Most members of the work group who support the contaminated property transfer markets (including the bankers, attorneys, and consultants at the table) recognize that it is essential that participants in that market be able to request and obtain MDEQ review and approval of these pre-acquisition site assessments which are the basis for achieving a release from strict liability. Without the ability to attain that level of assurance that "strict" liability has been avoided, the degree of uncertainty associated with many transactions will create barriers for the sale, purchase, and redevelopment of brownfield sites. The MDEQ does add real value when it performs this role responsibly, reasonably, and reliably and thus contributes to the smooth functioning of the state's contaminated property markets and to economic growth and development in Michigan.

    - ❖ In any case, any attempt to increase the rate of compliance with Due Care obligations by shifting the Part 201 program to a license- or permit-based program would likely require that the same information and data be reviewed in order to establish license requirements.

4. **There was no legislative intent in the 1995 Amendments to re-impose strict liability for "legacy" contamination on any new purchaser who conducted and disclosed an adequate BEA at the time of acquisition but subsequently failed to meet its Section 7a obligations. Failure to meet those obligations carries with it other liability exposures for the new owner (i.e., exacerbation, tort liability, etc.), but not strict liability for all "legacy" contamination present at the property (and for whatever has migrated beyond site boundaries as well).**

    - ❖ Some representatives of the MDEQ have advocated for changes to Part 201 that would create "strict" liability with respect to "legacy" contamination for new owners who initially buy their way out of the strict liability scheme at the time of acquisition (by conducting an adequate pre-acquisition site assessment and disclosing it to the MDEQ) but who subsequently fail to properly implement their Due Care obligations. This approach was vigorously resisted by other work group members who work closely with the contaminated property markets on the grounds that it would be unfair, unduly punitive, and unworkable from the standpoint of appraising risk when making lending and investment decisions.

    - ❖ MDEQ questioned how the changes thus far proposed – absent the risk of falling back into the "strict" liability trap – would result in greater compliance with a facility owner's Section 7a obligations than is presently being achieved?

- The idea of a permit or license was introduced to the group as a tool to address some of the perceived shortfalls related to "facility" owners and their due care obligations. Some group members agree the idea has merit. Others think different mechanisms could be used to accomplish the same objectives. Some potential elements of a permit or license program include:

    (a) By re-focusing the pre-acquisition site assessment on the identification of past releases of hazardous substances at the site which may have resulted in unacceptable exposure risks which need to be managed via an appropriate Due Care plan – and making a release from "strict" liability contingent on doing this to an acceptable performance standard – we would elevate the visibility and importance of determining how historical contamination has resulted (or could result) in unacceptable exposures – something that is now getting lost in the shadow of the BEA process.

    (b) Once that information is available, it would put all parties on notice (the property owner as well as the MDEQ) that certain measures must be taken to comply with Section 7a of Part 201. Many current new owners of "facilities" never even bother to collect the basic data needed to develop an appropriate Due Care plan.

    (c) The information obtained and disclosed to the MDEQ in the process of obtaining liability relief could then be used – if desired – to establish license or permit requirements for the "facility."

    (d) As site uses, hazards, or other circumstances change, or as facility licenses expire, Due Care plans and license requirements could be updated, if necessary.

    (e) The plans or licenses could be used by MDEQ to prioritize sites by level of risk for periodic inspections to verify or enforce the performance of Due Care obligations, through assessment of fines and penalties where appropriate.

    (f) Together, these measures would likely result in a significantly higher level of compliance with Due Care obligations (and thus a higher level of risk reduction") than is being currently achieved.

    (g) "Strict" liability for failure to properly implement Due Care is, in any case, not likely to "fly" with a majority of stakeholders. Accordingly, our focus needs to be on what can actually be achieved with those elements of the existing paradigm that are almost sure to be preserved.